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SCAIFE COMPANY

No. 981 57

In the Supreme Court of the United States

OCTOBER TERM, 1940

SCAIFE COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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The Circuit Court of Appeals for the Second Circuit, in its opinion in *Lerner Stores Corp. v. Commissioner*, 118 F. (2d) 455, indicated its view that its decision in the *Lerner* case was in conflict with the decision below in the present case. In the light of this statement, it is apparent that the Circuit Court of Appeals for the Second Circuit would decide the present case otherwise than it was decided below, and that to that extent a conflict of decisions exists. However, the two cases are distinguishable. In the *Lerner* case, the error in de-

claring the value was the result of a clerical mistake made by an employee of the taxpayer. Here, on the other hand, the value originally declared was determined in the first instance by the treasurer of the company, in the exercise of his judgment, and the error, far from being a clerical mistake, lay in the inadvertent disregard by the treasurer of the vice president's instructions.

The decision below that a return, so filed, may not be amended after the time for filing the original return has expired appears to be clearly correct under the principle established in *J. E. Riley Investment Co. v. Commissioner*, 311 U. S. 55. Moreover, since the issue is not one of great importance, we feel that this Court would be justified, despite the apparent conflict of views of the Second and Third Circuits, in denying the requested writ.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

MAY 1941.